Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1672

FIRST NATIONAL BANK OF OREGON, Trustee under the Will of Bertha E. Chambers, for the benefit of Shriners Hospitals For Crippled Children,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The First National Bank of Oregon, Trustee under the Will of Bertha E. Chambers, for the benefit of Shriners Hospitals For Crippled Children, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims (Appendix A, *infra*) is reported at 571 F. 2d 21 (1978).

JURISDICTION

The judgment of the Court of Claims was entered on February 22, 1978 (Appendix A, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

The final sentence of Section 2055(e)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) denies interest for a period beginning with the filing of a refund claim and ending 180 days thereafter to taxpayers on the overpayment of federal estate tax arising out of the allowance of a charitable deduction under that provision. Interest arising out of the allowance of the estate tax charitable deduction for any other reason is paid from the date of overpayment of estate tax. The question presented is whether the interest limitation in question violates the guarantee of equal protection of laws embodied within the due process clause of the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution, Section 2055(e)(2) and Section 2055(e)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), and Treasury Reulation § 1.664-1(f)(3) are set forth in Appendix B, C and D, *infra*.

STATEMENT OF THE CASE

Petitioner is the Trustee under the Will of Bertha E. Chambers, deceased, for the benefit of the Shriners Hospitals For Crippled Children. On September 29, 1973, Bertha E. Chambers, a resident of Marion

County, Oregon, died testate, and provided, under her will, a charitable remainder trust designating the Shriners Hospitals For Crippled Children at Portland, Oregon, and a church, beneficiaries upon termination of the life estate.

At the date of decedent's death, Section 2055(e)(2) of the Internal Revenue Code (the "Code") denied the estate a charitable deduction for the value of the remainder interest passing to charity. A timely estate tax return was filed, and Petitioner, as Executor, paid $583,401.40 in federal estate tax and $34,869.22 in interest. Thereafter, on December 23, 1975, the Circuit Court of Marion County, Oregon, issued a decree of reformation amending Paragraph Seventh of the Last Will and Testament of the decedent to create a 9% charitable remainder unitrust under the provisions of Sections 664 and 2055(e)(3) of the Internal Revenue Code. As a result of the above-described decree of reformation, a charitable contribution deduction was allowed Petitioner pursuant to Section 2055(e)(3) of the Code by the Internal Revenue Service. The Internal Revenue Service subsequently determined that the net estate tax owed by the decedent's estate was $354,322.00, rather than the $583,401.40 previously paid, and that there had been an overpayment of estate tax of $229,079.00.

Petitioner filed a timely claim for refund to recover interest on the overpayment of estate tax pursuant to Section 6611 of the Code, and claimed the limitation on interest in the final sentence of Section 2055(e)(3) unconstitutionally denied it equal protection of law. The basis of Petitioner's constitutional claim was that the interest limitation created an arbitrary and irrational classification between taxpayers (including char-

itable beneficiaries), and therefore violated the guarantee of equal protection of the laws contained in the Fifth Amendment Due Process clause. Petitioner's claim for refund was disallowed by the Internal Revenue Service on August 17, 1976.

Petitioner brought a timely action in the United States Court of Claims under 28 U.S.C. § 1491. The only issue before the Court of Claims was whether the last sentence of Section 2055(e)(3) of the Internal Revenue Code denied Petitioner equal protection of the laws in violation of the United States Constitution. After hearing oral argument on the parties' cross-motions for summary judgment, the Court of Claims held that the last sentence of Section 2055(e)(3) was constitutionally valid.

REASONS FOR GRANTING THE WRIT

In its opinion, the Court of Claims has decided an important question of federal law that never has been, but should be, considered by this Court, on whether Congress can constitutionally discriminate between taxpayers on paying or withholding interest on overpayments of federal tax. Furthermore, the Court of Claims' decision is in conflict with applicable due process decisions of this Court.

There is no question that both the federal government and the states are prohibited from denying equal protection of the laws. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The governing principle in equal protection analysis is that any classification of persons (including classifications of taxpayers) must be a reasonable one, and the Court of Claims has correctly stated this principle in its opinion (Appendix A, *infra*):

> "... the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike ..." (*Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)).

It is Petitioner's position that the last sentence of Section 2055(e)(3) of the Internal Revenue Code creates an arbitrary and unreasonable classification of taxpayers and charitable beneficiaries which has no rational relationship to Congress' purpose in enacting Section 2055(e)(3). That class consists of all estates and trusts (and all charitable beneficiaries thereof) whose governing instruments were amended in accordance with the provisions of Section 2055(e)(3) between the years 1973 and 1977, and which, because of Section 2055(e)(3), were entitled to recover interest on overpayment of tax only for the period beginning 180 days after the filing of a claim for refund. Interest on overpayments of estate tax arise from date of overpayment where the deduction was allowed pursuant to Treasury Regulations (which expired December 31, 1972), or where the deduction was allowable for any reason other than Section 2055(e)(3). Section 2055(e)(2) of the Code provides that no estate tax deduction shall be allowed for the transfer of a remainder interest in property to or for the use of a charitable organization unless the interest is in the form of a qualified charitable remainder unitrust, charitable remainder annuity trust (described in Section 664), or pooled income fund (described in Section 642(c)(5)). Under Treasury Regulation § 1.664-1(f)(3), unqualified charitable remainders created after July 31, 1969 and amended on or before December 31, 1972 were treated

as qualified "for all purposes" from, for example, the date of the decedent's death, if reformed by all interested parties on a timely basis. *Shriners Hospitals For Crippled Children* v. *Maryland National Bank,* 312 A. 2d 546 (Md. 1973). The recovery of interest on any overpayment of income, estate or gift tax which resulted from reformation under the regulations was governed by Section 6611(a), which allows interest from the date of overpayment. With the enactment of Section 2055(e)(3) in 1974, however, and the completely unexplained addition of the limitation on the recovery of interest, a new, special class of overpayers was created which was denied full recovery of interest on overpayments.

In its opinion, the Court of Claims appears to suggest that federal tax regulation is somehow different from other legislation, and that the federal government should be accorded more leeway in discrimination against certain taxpayers. The Court even states that tax regulation "may indeed be arbitrary and still withstand an equal protection challenge". (Appendix A, *infra.*) However, to justify any such classification, there must be a rational set of facts and circumstances perceived by the legislature, and in creating the discrimination, the legislature must have explicated its support of some sound national policy. *United States* v. *Maryland Savings-Share Insurance Corporation,* 400 U.S. 4 (1970). *Cf., New Orleans* v. *Dukes,* 427 U.S. 297 (1976). The Court of Claims has also implied that this Court's decision in *WHYY* v. *Borough of Glassboro,* 393 U.S. 117 (1968) should not be controlling, since it was based on Commerce Clause principles, rather than the Equal Protection Clause of the Fourteenth Amendment.

Petitioner submits that the Court of Claims has misapplied the principles of equal protection to this case. While it is true that the tax in question in *WHYY* was a state tax, and the tax in the instant case is a federal tax, the principles of equal protection are the same for both cases. In *WHYY*, this Court determined that there was no rational basis for distinguishing between domestic and foreign nonprofit corporations insofar as tax exemption was concerned, and nowhere in its opinion did this Court intimate that the challenged statute was unconstitutional because it imposed an undue burden on interstate commerce.

The principle of equality of treatment for taxpayers similarly situated has long been recognized, both by this Court and by the Court of Claims. As stated by Mr. Justice Frankfurter, "the Commissioner cannot tax one and not tax another without some rational basis for the difference". *United States* v. *Kaiser,* 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring); *International Business Machines Corp.* v. *United States,* 343 F. 2d 914 (1965), cert. denied 382 U.S. 1028 (1966). It is submitted that this principle of equality should govern the instant case.

In *United States* v. *Maryland Savings-Share Insurance Corporation,* 400 U.S. 4 (1970), in turning back an equal protection attack on Section 501(c)(14) of the Code, this Court emphasized that not all classifications between taxpayers are so invidious as to warrant being set aside:

> "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts.
>
> * * *

> Here the legislative history of H.R. 3297 affirmatively discloses that Congress had a rational basis for declining in 1963 to broaden the exemption by extending the cutoff date of § 501(c)(14)(B). Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways, see *Stanley* v. *Public Utilities Comm'n., supra,* similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly formed corporations, the multiplication of which might burden otherwise valid federal programs." 400 U.S. at 6-7.

Here, there is no set of facts in any governmental record justifying or explaining the limitation. Even the original draft of the bill's explanation, before its introduction, and the covering letter to the Congressman, contain no facts or rationale to support what appears to be a gratuitous action by an unknown staff employee of the Joint Committee on Internal Revenue Taxation. See Appendix E, *infra.*

In similar fashion, the rationale of a legislature, through the hearing and report process, provided ample support to permit the Court to uphold a "grandfather" clause. In this case, the limitation on interest contained in IRC Section 2055(e)(3) has no record whatever to support its purpose or reach. Since the bill's initial introduction in the House of Representatives on April 20, 1972, through and including the 1976 amendment of Section 2055(e), there is not a single word mentioned by the bill's sponsors, nor in hearings or committee reports, nor floor debate, as to

why the interest limitation exists.[1] We take the Court's rationale on classification to mean that where a worthy and rational purpose for a classification is explicated by the legislature, in direct response to an apparent pressing social need, there may be unequal protection of the laws. But absent a well defined area of concern, and a carefully articulated Congressional purpose, an economic classification like this interest limitation offends concepts of equal protection and due process. The Court of Claims speculated upon reasons why the Congress passed a law which contained a provision invidiously classifying taxpayers by the payment of interest to some and not to others. But a lawyer's speculation is hardly a rational "state of facts" under *Maryland Savings-Share Insurance Corporation, supra,* which serves as justification for the classification here in question.

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[1] As to original bill, see Cong. Rec. April 20, 1972; Cong. Rec. July 24, 1972, S. 11516 (relating to S. 3841, a counterpart of H.R. 14513); Cong. Rec. October 16, 1972, S. 14802; Cong. Rec. January 30, 1973, February 22, 1973 (H.R. 3227 and 4606); Cong. Rec. October 25, 1973, H. 9439; Cong. Rec. December 5, 1973 (H.R. 11785); S. Rep. 93-1063 (93rd Cong., 2d Sess., August 1, 1974); Cong. Rec. August 13 ,1974, S 14854; H. Rep. 93-1405 (93rd Cong. 2d Sess., October 1, 1974); Cong. Rec. October 11, 1974, H 10509. As to extension, see Cong. Rec. September 29, 1975 (H.R. 9889); H. Rep. 94-1268 (94th Cong., 2d Sess. June 16, 1976); Cong. Rec. June 22, 1976, H. 6370; S. Rep. 94-938 (94th Cong., 2d Sess., June 10, 1976); H. Rep. 94-1236 (94th Cong., 2d Sess., September 14, 1976. Bill references are to various versions of IRC Sec. 2055(e)(3). Congressional Record references are to daily editions of the Record. Because Petitioner's counsel was so intimately involved in the legislative process leading first to enactment of Sec. 2055(e)(3) in 1974 and thereafter to its extension, in 1976, a complete legislative history of the provision is available for inspection, and can be supplied as an appendix to this Petition. Counsel for Respondent has a set.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 135-77

(Decided February 22, 1978)

FIRST NATIONAL BANK OF OREGON, duly appointed Executor of the Estate of Bertha E. Chambers and Trustee of the Bertha E. Chambers Charitable Remainder UNITRUST v. THE UNITED STATES

William J. Lehrfeld, attorney of record for plaintiff. *Webster & Chamberlain,* of counsel.

Patricia B. Tucker, with whom was *Assistant Attorney General M. Carr Ferguson,* for defendant. *Theodore D. Peyser* and *Donald H. Olson,* of counsel.

Before COWEN, *Senior Judge,* NICHOLS and BENNETT, *Judges.*

On the Parties' Cross-Motions for Summary Judgment

COWEN, *Senior Judge,* delivered the opinion of the court:

This case raises the issue whether the last sentence of 26 U.S.C. § 2055 (e)(3) (Supp. V. 1975) violates the equal protection clause of the 14th Amendment as included in the Fifth Amendment's due process clause.[1] The sentence in question will not permit interest to be paid to a taxpayer

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[1] The inclusion of the equal protection clause in the Fifth Amendment is now well settled. *Bolling v. Sharpe,* 347 U.S. 497 (1954); *Bruinooge v. United States,* 213 Ct. Cl. 26, 550 F.2d 624 (1977).

until 180 days after he has filed a claim for refund, if the refund is made possible by the reformation of a trust pursuant to section 2055(e)(3) for the purpose of permitting a charitable deduction in accordance with section 2055(e)(2)(A). We hold that the provision in issue withstands plaintiff's constitutional attack.

The case comes before us on cross-motions for summary judgment and the facts are not in dispute. Plaintiff is the executor of the estate of Bertha Chambers. Mrs. Chambers died on September 29, 1973, and left a will which was admitted to probate in Oregon. Under the terms of the will a charitable trust was to be established with the sister of the decedent and two charities designated as income beneficiaries and one of these charities designated as residual beneficiary. Under the will as written, the bequests to the charities could not be deducted from the gross estate as charitable contributions, because the trust was not a qualifying charitable remainder annuity trust, unitrust, or pooled income fund as required for charitable remainder deductions by 26 U.S.C. § 2055(e)(2)(A).[2] Therefore, after receiving extensions of 12 months within which to pay the estate tax due, plaintiff paid $583,401.40 in tax and $34,868.22 in 12-month assessed interest to the Internal Revenue Service (IRS).

In 1974, however, Congress enacted 26 U.S.C. § 2055(e)(3) which, in the case of wills executed before September 21, 1974, creating charitable remainder interests unqualified for deductions under section 2055(e)(2)(A), permitted reformation of these wills to meet the requirements of that section. In accordance with section 2055(e)(3), plaintiff obtained a reformation of the trust provisions in Mrs. Chambers' will so that the bequests to the charities would be deductible in computing the Federal estate tax due.

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[2] For a further discussion of this provision and its background, see this court's opinion in *Ellis First Nat'l Bank v. United States*, 213 Ct. Cl. 44, —, 550 F.2d 9, 11 (1977).

Plaintiff and the IRS agreed that the refund of tax due as a consequence of the reformation of the trust and resultant increase in allowable deductions was $229,079.[3]

What plaintiff contests in this court is the constitutionality of the last sentence of section 2055(e)(3) on which the IRS relied to deny plaintiff interest on its $229,079 overpayment for the first 180 days after plaintiff filed its claim for refund. The sentence provides:

> * * * In the case of a credit or refund as a result of an amendment or conformation made pursuant to this paragraph, no interest shall be allowed for the period prior to the expiration of the 180th day after the date on which the claim for credit or refund is filed.

Plaintiff claims that this provision, applicable to wills executed or trusts created before September 21, 1974, and amended by December 31, 1977,[4] is arbitrary and illogical when contrasted with the prior policy of the Department of the Treasury. In 1969, when it enacted section 2055(e)(2)(A), Congress generally allowed a deduction under prior law in the case of wills executed on or before October 9, 1969, or trusts created before that date, if the donor died before October 9, 1972, without having changed such will or trust. Tax Reform Act of 1969, Pub. L. 91-172, § 201(g)(4), 83 Stat. 487. The Treasury Department subsequently issued regulations to minimize the adverse tax impact of

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[3] In its petition to this court, plaintiff claimed that the IRS, when it agreed to refund $229,079 out of the $583,401.40 tax originally paid, did not agree to refund a correct percentage of the $34,868.22 in interest paid on account of plaintiff's 12-month delay in paying the state tax due. In its brief and at oral argument, plaintiff has abandoned this claim.

[4] The reformation provision originally applied only to instruments amended by December 31, 1975, 26 U.S.C. § 2055(e)(3) (Supp. V. 1975). This date was extended to December 31, 1977, by section 1304(a) of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520.

section 2055(e)(2)(A) on improperly drawn instruments executed after July 31, 1969, and amended to conform with section 2055(e)(2)(A) on or before December 31, 1972. These regulations provided that unqualified charitable remainders created and reformed to qualify during this period of time would be treated as qualified "for all purposes" from the date of their original creation. Treas. Reg. § 1.664-1(f)(3), 26 C.F.R. § 1.664-1(f)(3) (1973). Thus, just as under present section 2055(e)(3), if estate taxes were overpaid by an estate in this situation, the overpayment would be refunded. The salient factor in the case at bar, however, is that any claims for refund pursuant to these Treasury regulations affecting instruments drawn and reformed between 1969 and 1973 were entitled to interest pursuant to 26 U.S.C. § 6611(a) [5] from the date of overpayment. Therefore, plaintiff contends that the current provision denying this interest for 180 days to estates amending instruments between 1973 and 1977, created a new special class of taxpayers who were denied full recovery of interest on their overpayments, contrary to the 1969-73 policy of the Treasury. Since plaintiff can perceive no logical reason for this change in policy, it contends the new class of taxpayers has been denied equal protection of the laws.[6]

The merits of plaintiff's argument need not detain us unduly. We do not sit as a superlegislature to judge the wisdom or desirability of the challenged provision. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). As long as a suspect

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[5] The provision reads: "Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at an annual rate established under section 6621." 26 U.S.C. § 6611(a) (Supp. V 1975).

[6] Plaintiff also claimed in its petition to this court that the interest limitation in section 2055(e)(3) constituted a taking without just compensation in violation of the Fifth Amendment. In its brief, plaintiff has abandoned this claim.

classification, such as race, or an area of intermediate scrutiny, such as sex, is not involved, the test to be applied to the challenged provision is the following:

> • • • the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. • • • (*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

Johnson v. Robison, 415 U.S. 361, 374-75 (1974); *Bruinooge v. United States*, 213 Ct. Cl. 26, ——, 550 F.2d 624, 627 (1977); *Fredrick v. United States*, 205 Ct. Cl. 791, 797, 507 F.2d 1264, 1266 (1974). This is the so-called "minimum rationality" or "conceivable basis" standard. The Supreme Court has variously phrased the test as mandating that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowen v. Maryland*, 366 U.S. 420, 426 (1961); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

In one case, *Morey v. Doud*, 354 U.S. 457 (1957) the Court found an economic regulation to be an arbitrary classification violative of equal protection. An Illinois statute did not permit "currency exchanges" to sell money orders at drug stores or grocery stores, and yet exempted the American Express Company from the restriction, apparently because the Company was an enterprise of unquestioned solvency and high financial standing. The Supreme Court invalidated this classification as arbitrary in the *Morey* decision, but in a recent case, the Court expressly overruled that decision. In *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976), the Court stated:

> • • • *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. • • •

We are not aware of any Supreme Court decision in recent years holding that a Federal tax regulation subject to a "minimum rationality" test is violative of the equal protection clause.[7] Moreover, the Court's decision in New *Orleans, supra,* seems to clarify that at least with regard to Federal tax regulations and other economic regulations, a Federal court has very little room for disapproval of them if any "state of facts reasonably" justifyies them. *Id.*

In fact, as we intimated in our decision in *Bruinooge, supra* (213 Ct. Cl. at ——, 550 F.2d at 626), when a Federal tax regulation is involved it is possible that the regulation

[7] *See, e.g., United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970). Plaintiff, however, in response to a question at oral argument in the case at bar, proffered *WHYY v. Borough of Glassboro*, 393 U.S. 117 (1968), as the strongest support for its argument that the tax provision in question before this court violates equal protection. The plaintiff there challenged a New Jersey statute which exempted New Jersey nonprofit corporations from state real and personal property taxes while denying the same benefit to a foreign nonprofit corporation operating in New Jersey. The Court stated, in finding the statute did violate equal protection, that it was following a rule which

> "• • • has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis'." [*Id.* at 119].

This long-held rule of the Supreme Court, that state taxes which discriminate against an out-of-state transactor in favor of some local interest violate equal protection, is not applicable to the Federal tax regulation challenged at bar. The policy of disallowing discriminatory state taxes is consistent with other Supreme Court rules which prevent burdens on the free flow of interstate commerce. On the other hand, the only policy which applies to the case at hand is the long-held policy, discussed above in the text, against invalidating a Federal tax or other economic regulation as violative of equal protection.

may indeed be arbitrary and still withstand an equal protection challenge. Mr. Justice Brennan, in his recent opinion for the Court in *Commissioner v. Kowalski,* —— U.S. 46 U.S.L.W. 4015, 4020 (Nov. 29, 1977), remarked:

> • • • arguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary. • • •

However, we need not decide this further question, for the interest limitation in issue before this court is rationally justifiable.

We will not explore all of the reasons the Government advances for justification of the provision in order to reach our decision. We accept the Government's argument that section 2055(e)(3) is a wholly remedial provision, and that the limitation on interest is an appropriate restriction on a grace period provided by Congress for reformation of wills and trust provisions by the estates of those persons who failed to rewrite their wills after 1969 to comply with section 2055(e)(2)(A). The fact that the Treasury Department did not limit the payment of interest in its regulations between 1969-73 does not prevent Congress from imposing an appropriate restriction when it enacts a piece of purely remedial legislation in order to benefit a taxpayer or, more particularly, a charitable remainder interest designated by the taxpayer.

Plaintiff has attempted by the following arguments to circumvent the long-standing precedent against invalidating on equal protection grounds a Federal tax regulation such as the one in question here. First, plaintiff argues that the interest limitation is irrational, because the purpose of section 2055(e)(3) was to protect charitable beneficiaries of certain unqualified charitable remainder trusts rather than to penalize them by limiting their right to interest. This

argument has no merit. There is nothing irrational about a law which provides remedial legislation for charitable beneficiaries, and at the same time limits the expense the Government must undergo in effectuating these benefits.

Second, plaintiff contends the classification in question must further a "legitimate" state purpose, meaning that it is not enough for a court to find *some* rational basis to uphold the classification. Plaintiff cites *McGinnis v. Royster,* 410 U.S. 263, 270 (1973), for this proposition. A careful reading of the *McGinnis* decision, however, reveals the Court's actual ruling that the "appropriate standard" for decision is that the legislative classification in question needs "only *some* rational basis" to be sustained. (emphasis added) *Id.*

Third, plaintiff again cites *McGinnis* for the proposition that the rational basis on which the classification is upheld must be "articulated." Plaintiff intimates that unless the rational basis is articulated in the legislative history of the statute itself, the challenged provision cannot meet constitutional muster. This has never been the holding of the Supreme Court, and it is not the holding of *McGinnis.* The *McGinnis* decision itself appears to rely mainly on rational bases enunciated by the state in its brief and at oral argument, not on the legislative history of the classification in question there. *Id.* In the absence of legislative history, the methodology which this court recently used in determining whether a challenged provision such as the one here violates equal protection is set out in *Bruinooge,* (213 Ct. Cl. at ——, 550 F.2d at 627): "• • • we try to divine what Congress left unstated [and] we resort to our own talents and those of counsel to discern" the rationality of the classification in question.

As we have shown, the law in the challenged area of equal protection analysis has been well-settled for many years

now.[8] Therefore, for the reasons set out in our opinion above, the Government's motion for summary judgment is granted, and the plaintiff's petition is dismissed.

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[8] In a recent action involving this identical issue in the United States District Court for the District of New Hampshire, Judge Bownes saw so little merit in the plaintiff's contentions that he dismissed them with one sentence:

> "• • • The provision to the extent that it sets up a separate class is reasonable and must be considered together with the special deduction which it created."

Merchants Nat'l Bank v. United States, Civil Action No. 76-275 (Nov. 29, 1977).

APPENDIX B

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

Internal Revenue Code of 1954, as amended (26 U.S.C.):

Section 2055(e). Disallowance of Deductions in certain cases—

• • •

(2) Where an interest in property (other than an interest described in section 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in subsection (a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in subsection (a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in subsection (a) unless—

(A) in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664) or a pooled income fund (described in section 642(c)(5)), or

(B) in the case of any other interest, such interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).

(3) In the case of a will executed before December 31, 1977, or a trust created before such date, if a deduction is not allowable at the time of the decedent's death because of the faiiure of an interest in property which passes from the decedent to a person, or for a use, described in subsection (a), to meet the requirements of subparagraph (A) of paragraph (2) of this subsection, and if the governing instrument is amended or conformed on or before December 31,

1977, or, if later, on or before the 30th day after the date on which judicial proceedings begun on or before December 31, 1977 (which are required to amend or conform the governing instrument), become final, so that the interest is in a trust which is a charitable remainder annuity trust, a charitable remainder unitrust (described in section 664), or a pooled income fund (described in section 642(c)(5)), a deduction shall nevertheless be allowed. The Secretary may, by regulation, provide for the application of the provisions of this paragraph to trusts whose governing instruments are amended or conformed in accordance with this paragraph, and such regulations may provide for any adjustments in the application of the provisions of section 508 (relating to special rules with respect to section 501(c)(3) organizations), subchapter J (relating to estates, trusts, beneficiaries, and decedents), and chapter 42 (relating to private foundations), to such trusts made necessary by the application of this paragraph. If, by the due date for the filing of an estate tax return (including any extension thereof), the interest is in a charitable trust which, upon allowance of a deduction, would be described in section 4947(a)(1), or the interest passes directly to a person or for a use described in subsection (a), a deduction shall be allowed as if the governing instrument was amended or conformed under this paragraph. If the amendment or conformation of the governing instrument is made after the due date for the filing of the estate tax return (including any extension thereof), the deduction shall be allowed upon the filing of a timely claim for credit or refund (as provided for in section 6511) of an overpayment resulting from the application of this paragraph. In the case of a credit or refund as a result of an amendment or conformation made pursuant to this paragraph, no interest shall be allowed for the period prior to the expiration of the 180th day after the date on which the claim for credit or refund is filed.

APPENDIX D

Treasury Regulations (26 C.F.R.):

§ 1.664-1(f)(3). Amendment of post-1969 trusts. A trust created (within the meaning of applicable local law) subsequent to July 31, 1969, and prior to December 31, 1972, which is not a charitable remainder trust at the date of its creation, may be treated as a charitable remainder trust from the date it would be deemed created under § 1.664-1(a)(4) and (5)(i) for all purposes provided that all the following requirements are met:

(i) At the time of the creation of the trust, the governing instrument provides that an organization described in section 170(c) receives an irrevocable remainder interest in such trust.

(ii) The governing instrument of the trust is amended so that the trust will meet the definition of a charitable remainder trust and, if applicable, will meet the requirement of paragraph (a)(5)(i) of this section that obligation to make payment of the annuity or unitrust amount with respect to property passing at death begin as of the date of death, before December 31, 1972, or if later, on or before the 30th day after the date on which any judicial proceedings which are begun before December 31, 1972, and which are required to amend its governing instrument, become final. In the case of a trust created (within the meaning of applicable local law) subsequent to July 31, 1969, and prior to December 31, 1972, the provisions of section 508(d)(2)(A) shall not apply if the governing instrument of the trust is amended so as to comply with the requirements of section 509(e) before December 31, 1972, or if later, on or before the 30th day after the date on which any judicial proceedings which are begun before December 31, 1972, and which are required to amend its governing instrument, become final. Notwithstanding the provisions of paragraphs (a)(3) and (a)(4) of §§ 1.664-2 and 1.664-3, the governing instru-

ment may grant to the trustee a power to amend the governing instrument for the sole purpose of complying with the requirements of this section and § 1.664-2 or § 1.664-3 provided that at the creation of the trust, the governing instrument (a) provides for the payment of a unitrust amount described in § 1.664-3(a)(1)(i) or an annuity which meets the requirements of paragraph (a)(2) of §§ 1.664-2 or 1.664-3, (b) designates the recipients of the trust and the period for which the amount described in (a) of this subdivision (ii) is to be paid, and (c) provides that an organization described in section 170(c) receives an irrevocable remainder interest in such trust. The mere granting of such a power is not sufficient to meet the requirements of this subparagraph that the governing instrument be amended in the manner and within the time limitations of this subparagraph.

(iii) (a) Where the amount of the distributions which would have been by the trust to a recipient if the amended provisions of such trust had been in effect from the time of creation of such trust exceeds the amount of the distributions made by the trust prior to its amendment, the trust pays an amount equal to such excess to the recipient.

(b) Where the amount of distributions made to the recipient prior to the amendment of the trust exceeds the amount of the distributions which would have been made by such trust if the amended provisions of such trust had been in effect from the time of creation of such trust, such excess is repaid to the trust by the recipient.

See paragraph (d)(4) of this section for rules relating to the year of inclusion in the case of an underpayment to a recipient and the allowance of a deduction in the case of an overpayment to a recipient. A deduction for a transfer to a charitable remainder trust shall not be allowed until the requirements of this paragraph are met and then only if the deduction is claimed on a timely-filed return (including extensions) or on a claim for refund filed within the period of limitations prescribed by section 6511(a).

APPENDIX E

March 28, 1972

Honorable James A. Burke
House of Representatives
Washington, D.C. 20515

Dear Mr. Burke:

This refers to your letter requesting that we prepare a bill for you extending the period during which it is possible for interested parties to amend or reform charitable remainder trusts so that they will comply with provisions of the 1969 Tax Reform Act. Pursuant to your request, I am enclosing a draft bill and an explanation of the bill.

We note that the Shriners Hospital for Crippled Children has suggested that the amendment period be extended until July 31, 1979. This would mean that the rules applying to charitable remainder annuity trusts and charitable remainder unitrusts, which were enacted in 1969, would not become effective until the end of 10 full years after their enactment. We believe that a 10-year period is probably too long and results in an unnecessary postponement of the application of the legislation enacted in 1969.

The reason for approving an extension of the transitional rules approved in 1969 is to allow a period of time for individuals drafting instruments of this sort to become familiar with the new rules in order that they may properly draft instruments in compliance therewith. It is believed that this educational process should, and will, be accomplished before the expiration of a 10-year period. We have, therefore, provided in the bill which we have drafted for you, that the period during which the governing instrument may be reformed is to expire on July 31, 1975. This will permit, therefore, an aggregate period of 6 years during which it will be possible to reform instruments so that they comply with the legislation enacted in 1969 regarding charitable remainder trusts.

Sincerely yours,

LAURENCE N. WOODWORTH

Burke of Massachusetts

To amend the Internal Revenue Code of 1954 to provide for an estate tax charitable trust in the case of certain charitable remainder trusts.

That (a) section 2055(e) of the Internal Revenue Code of 1954 (relating to the disallowance of deductions in certain cases) is amended by adding at the end thereof a new paragraph to read as follows:

"(3) If a deduction is not allowable at the time of decedent's death, because of the failure of an interest in property which passes from the decedent to a person, or for a use, described in subsection (a), to meet the requirements of subparagraph (A) of paragraph (2) of this subsection and if——

"(A) the governing instrument of the trust is amended on or before the 30th day after the date on which judicial proceedings begun before July 31, 1975 (which are required to amend the governing instrument) become final, so that the interest is in a trust which is a charitable remainder annuity trust or a charitable unitrust (described in section 664); and

"(B) the amendment to the governing instrument is valid under the law of the jurisdiction of the situs of the trust,

a deduction shall nevertheless be allowed upon the filing, after the amendment to the governing instrument is made, of a timely claim for credit or refund (as provided for in section 6511) of an overpayment resulting from the application of this paragraph. In the case of a credit or refund as a result of an amendment made pursuant to this paragraph, no interest shall be allowed for the period prior to the expiration

of six months after the date on which the claim for credit or refund is filed."

(b) The amendment made by this Act shall apply in the case of decedents dying after December 31, 1969.

Explanation of the Bill

The Tax Reform Act of 1969 provided that an estate tax charitable deduction is allowed for a charitable gift of a remainder interest in trust, where there is a non-charitable income beneficiary, only if the trust is either a charitable remainder annuity trust or a charitable remainder unitrust. These general limitations are provided so that the amount received by the charity will be consistent with the charitable deduction allowed to the donor on the creation of the trust. An annuity trust is one which specifies in dollar terms the annual amount of the annuity which is to be paid to the income beneficiary. The unitrust is one which specifies that the income beneficiary is to receive annual payments based on a fixed percentage of the fair market value of the trust assets, as determined each year.

Under the 1969 legislation, these provisions apply with respect to transfers in trust made after July 31, 1969. By regulation and administrative announcement, the deadline for amending governing instruments of charitable trusts (created after July 31, 1969), so that they conform with the new annuity trust or unitrust rules has been extended until July 31, 1972. If a trust does not qualify under these new rules a testamentary transfer in trust will not qualify for an estate tax charitable deduction. Since lawyers drafting instruments creating charitable remainder trusts are generally unfamiliar with the new rules, many instruments creating trusts which provide for remainder interests to charity will not qualify for a charitable deduction.

This bill, therefore, provides that if the governing instrument of a trust providing for a charitable remainder interest is reformed (pursuant to State law) before July 31, 1975, so that it complies with these new rules, an estate tax charitable deduction will nevertheless be allowed. The bill will result in an aggregate transitional period of six years, from the effective date of the 1969 Act rules, during which time it will be possible for individuals drafting instruments of this type to become familiar with the new rules and to draft instruments in compliance with them.

Supreme Court, U. S.
FILED
JUL 12 1978
MICHAEL RODAK, JR., CLERK

No. 77-1672

In the Supreme Court of the United States

OCTOBER TERM, 1978

FIRST NATIONAL BANK OF OREGON, TRUSTEE UNDER THE WILL OF BERTHA E. CHAMBERS, FOR THE BENEFIT OF SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

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FIRST NATIONAL BANK OF OREGON, TRUSTEE UNDER THE WILL OF BERTHA E. CHAMBERS, FOR THE BENEFIT OF SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal estate tax case is whether the Court of Claims correctly upheld the constitutionality of the last sentence of Section 2055(e)(3) of the Internal Revenue Code of 1954 (26 U.S.C., Supp. V). That sentence provides that "no interest shall be allowed for the period prior to the expiration of the 180th day after the date on which the claim for credit or refund is filed," where such credit or refund is "a result of an amendment or conformation made pursuant to * * * [Section 2055(e)(3)]." Petitioner asserts that this provision violates its Fifth Amendment right to equal protection of the laws.

The pertinent facts are as follows: Petitioner is the executor of the estate of Bertha Chambers, who died on September 29, 1973. The decedent's will established a charitable trust designating the decedent's sister and two charities as income beneficiaries, and one of these charities as residuary beneficiary. As of the date of decedent's death, the bequest to the residuary charitable beneficiary failed to qualify as an estate tax charitable deduction because the charitable trust was not a charitable remainder annuity trust, unitrust, or pooled income fund, as required by Section 2055(e)(2)(A) of the Code. The executor paid an estate tax of $583,401.40 (Pet. App. A, p. 2a).

In 1974, Congress added Section 2055(e)(3) to the Code,[1] which provided, in pertinent part, that—

> In the case of a will executed before September 21, 1974 * * * if a deduction is not allowable at the time of the decedent's death because of the failure of an interest in property which passes from the decedent to a person, or for a use, described in subsection (a), to meet the requirements of subparagraph (A) of paragraph (2) of this subsection, and if the governing instrument is amended or conformed on or before December 31, 1975, * * * so that the interest is in a trust which is a charitable remainder annuity trust, a charitable remainder unitrust (described in section 664), or a pooled income fund (described in section 642(c)(5)), a deduction shall nevertheless be allowed.

Accordingly, on December 23, 1975, petitioner obtained a judicial reformation of the will to create a nine percent charitable remainder unitrust under Sections 664 and 2055(e)(3). Petitioner and the Internal Revenue Service

[1]See Section 3(a) of the Act of October 26, 1974, 88 Stat. 1457.

thereafter agreed that as a result of the post-death amendment of the decedent's will, the value of the charitable remainder qualified as an estate tax charitable deduction under Section 2055 and that the estate was due an estate tax refund of $229,079 (Pet. App. A, pp. 2a-3a).

Petitioner claimed that the estate was entitled to interest on the refund from the date of overpayment, under Section 6611. However, the Internal Revenue Service determined that the amount of interest payable was governed by the last sentence of Section 2055(e)(3), which permits the interest payment in such cases only from the 181st day after the filing of the claim for refund (Pet. App. A, p. 3a). In this refund suit brought by petitioner in the Court of Claims, the court held that Section 2055(e)(3) applied and that the statute did not violate petitioner's right to equal protection of the laws under the Fifth and Fourteenth Amendments (Pet. App. A, pp. 4a-9a).

The Court of Claims properly rejected petitioner's constitutional challenge to Section 2055(e)(3). As the court noted, the limitation upon the payment of interest to estates was the condition upon which Congress permitted estates of decedents who had failed to rewrite their wills to conform their charitable bequests to Section 2055(e)(2)(A) and thereby become eligible for a charitable deduction. As the Court of Claims noted (Pet. App. A, p. 8a), "[t]here is nothing irrational about a law which provides remedial legislation for charitable beneficiaries, and at the same time limits the expense the Government must undergo in effectuating these benefits." Moreover, the interest limitation provision allows the Commissioner an additional period of time, without the running of interest, in which to determine whether the estate has met the requirements of Section 2055.

There are a variety of similar provisions in the Internal Revenue Code that have withstood constitutional challenges. In *Bulova Watch Co.* v. *United States*, 365 U.S. 753, this Court upheld the constitutionality of Section 3771 of the 1939 Code, which prohibited the recovery of interest on a tax refund generated by the carryback of an unused excess profits credit adjustment prior to the time that a claim for refund was filed. Likewise, Section 7(b) of the Technical Changes Act of 1949, 63 Stat. 895-896, which provided that no interest would be paid on any overpayment of tax which was refundable, because of the remedial provisions of that Act, has been sustained. *In re Cardeza's Estate*, 261 F. 2d 423 (C.A. 3).[2] See also *Hanover Bank* v. *United States*, 285 F. 2d 455 (Ct. Cl.).[3]

[2]There are other Code provisions restricting the payment of interest. For example, Section 2011(c) provides that no interest is to be paid with respect to a refund of federal estate taxes if the refund is due to a credit claimed for payment of state, estate, inheritance, legacy or succession taxes. Section 2014(e) contains a similar limitation for refunds of federal estate taxes caused by a credit for foreign death taxes paid. Section 6413(a) and (d) provides that interest may not be recovered on overpayments of taxes under the Federal Unemployment Tax Act. Sections 6416, 6420, and 6421 prohibit the recovery of interest on certain refunds of overpayment of excise taxes. Finally, Section 6611(f) and (g) limits the interest recoverable on federal income tax due a taxpayer because of certain loss, credit, or foreign tax credit carrybacks.

[3]In a case involving the identical issue, the district court in *Merchants National Bank* v. *United States*, D. N.H., Civ. Action No. 76-275, decided November 29, 1977, appeal pending, C.A. 1, Nos. 78-1043 and 78-1060, likewise rejected the taxpayer's claim, stating "[t]he provision to the extent that it sets up a separate class is reasonable and must be considered together with the special deduction which it created" (Pet. App. A, p. 9a n. 8).

As this Court stated in *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6, "[n]ormally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." See also *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8. There is accordingly no merit to petitioner's contention (Pet. 7-9) that a statute whose purpose is not articulated in legislative history may not satisfy this test. "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them" (*McDonald* v. *Board of Election*, 394 U.S. 802, 809). The procedures specified by Article I of the Constitution for the enactment of federal legislation do not include a requirement that legislative history be generated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.